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90-1019

Supreme Court, U.S.
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NUMBER:

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1990

IMCO, INC., AND JERRY W. IKARD D/B/A
IKARD MANUFACTURING COMPANY,

Petitioners,

V.

CURTIS R. MORTON, Commander
of the United Staes Defense
Contracts Administration Services
Management Area - Birmingham;
MICHAEL P. W. STONE, Secretary
of The United States Department
of the Army; MAURICE H. DEFORD
as Acting Commander of The
United States Army Legal Services
Agency; WILLIAM K. SUTER, Judge
Advocate General of the United
States Department of the Army,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether 15 U.S.C. 637(b)(7)(A) mandates that Unites States Government procurement officers must, prior to precluding a small business concern from being awarded a contract, refer the matter for a final disposition to the Small Business Administration when the basis for preclusion is the small business concern's suspension from contracting because of the Government procurement officers' finding of nonresponsibility because of an alleged unsatisfactory performance on one or more contracts.

LIST OF ALL PARTIES

1. **IMCO, INC.**, an Alabama Corporation. Petitioner herein, Appellant in the Court of Appeals, Plaintiff in the District Court. All of its stock is owned by Jerry W. Ikard. IMCO, INC., has no parent companies, affiliates, or non wholly-owned subsidiaries other than Ikard Manufacturing Company.

2. **Jerry W. Ikard d/b/a Ikard Manufacturing Company**. Petitioner herein, Appellant in the Court of Appeals, Plaintiff in the District Court. Ikard Manufacturing Company is the predecessor business to IMCO, INC., and is wholly owned by IMCO, INC. Ikard Manufacturing Company has no affiliates or non wholly-owned subsidiaries.

3. **Curtis R. Morton**, as Commander of the

United Staes Defense Contracts Administration Services Management Area-Birmingham. Respondent herein, Appellee in the Court of Appeals, Defendant in the District Court.

4. **Michael P. W. Stone**, as Secretary of the United States Department of the Army. Respondent herein, Appellee in the Court of Appeals, Defendant in the District Court.

5. **Maurice H. DeFord**, as Acting Commander of the United States Army Legal Services Agency. Respondent herein, Appellee in the Court of Appeals, Defendant in the District Court.

6. **William K. Suter**, as Judge Advocate General of the United States Department of the Army. Respondent herein, Appellee in the Court of

Appeals, Defendant in the District Court.

TABLE OF CONTENTS AND AUTHORITIES

A. TABLE OF CONTENTS **PAGE**

1. Questions Presented for Review i
2. Parties to the Action in the United States Court of Appeals for the Eleventh Circuit ii
3. Table of Contents and Authorities v
   A. Table of Contents v
   B. Table of Authorities vi
4. Opinions Below 1
5. Jurisdiction Statement 2
6. Statutory Provisions Which the Case Involves 3
7. Regulatory Provisions Which the Case Involves 4
8. Statement of the Case 4
   A. Nature of the Case 4
   B. Course of Proceedings and Disposition in the Courts Below 5
   C. Facts 8

TABLE OF CONTENTS AND AUTHORITIES

A. TABLE OF CONTENTS (continued) **PAGE**

8. Reasons for Granting the Writ of Certiorari: 15

Overview 15

Part I 20

Part II 37

Part III 48

9. Conclusion 55

B. TABLE OF AUTHORITIES

CASES:

CASES **PAGES**

Electro-Methods, Inc. v. United States, 728 R.2d 1471 (Fed.Cir., 1984) 37, 40, 43

Horne Brothers, Inc. v. Laird, 342 F.Supp. 703 (D.C., 1972) 46, 47

Horne Brothers, Inc. v. Laird, 463 F.2d 1268 (D.C., 1972) 47

NFK Engineering, Inc. v. United States, 805 F.2d 37, 40, 42, 43

B. TABLE OF AUTHORITIES (cont.)

CASES (cont.):

CASES	PAGES
372 (Fed.Cir. 1986)	
Siller Brothers, Inc. v. United States, 655 F.2d 1039 (Ct.Cl. 1986), cert. denied 456 U.S. 925 (1982)	37, 40, 43, 45

STATUTES

STATUTE	PAGES
5 U.S.C. 701, et. seq.	5
5 U.S.C. 702	3
5 U.S.C. 704	3
5 U.S.C. 705	3
5 U.S.C. 706	3
10 U.S.C. 2301-2314	5
15 U.S.C. 631, et. seq.	5, 6, 8, 48
15 U.S.C. 631	3
15 U.S.C. 637(b)(7)(a)	3, 8, 13, 16, 17, 18, 19, 20, 21, 22, 29, 30, 33, 35, 37, 38, 39, 44, 45, 50

B. TABLE OF AUTHORITIES (cont.)

STATUTES (cont.)

STATUTE	PAGES
28 U.S.C. 1254(1)	3
28 U.S.C. 1331	4
28 U.S.C. 1361	4
28 U.S.C. 1391	4
28 U.S.C. 2201	3, 4
28 U.S.C. 2202	3, 4

FEDERAL RULES OF CIVIL PROCEDURE

FEDERAL RULE	PAGE NO.
F.R.C.P. 4	6

FEDERAL REGULATIONS

FEDERAL REGULATIONS	PAGES
Armed Services Procurement Regulation 1-903.1	47
Armed Services Procurement Regulation 1-705.4	47
Fed. Acquisition Reg. 9.101	4, 25
Fed. Acquisition Reg. 9.104	25, 26, 29

B. TABLE OF AUTHORITIES (cont.)

FEDERAL REGULATIONS (cont.)

FEDERAL REGULATIONS	PAGES
Fed. Acquisition Reg. 9.104-1	4, 26, 28, 29, 30
Fed. Acquisition Reg. 9.104-3	4, 26, 30
Fed. Acquisition Reg. 9.4	4, 5, 23
Fed. Acquisition Reg. 9.402	4, 23, 25
Fed. Acquisition Reg. 9.406	11
Fed. Acquisition Reg. 9.406-2	4, 24, 25, 29
OTHER SOURCES	
U.S. Code Congressional and Administrative News, 83rd Congress, First Session, 1953, Volume 2	50
U.S. Code Congressional and Administrative News, 95th Congress, Volume 2	51

NUMBER:

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

IMCO, INC., AND JERRY W. IKARD D/B/A IKARD MANUFACTURING COMPANY,

Petitioners,

V.

CURTIS R. MORTON, Commander of the United States Defense Contracts Administration Services Management Area - Birmingham; MICHAEL P. W. STONE, Secretary of The United States Department of the Army; MAURICE H. DEFORD as Acting Commander of The United States Army Legal Services Agency; WILLIAM K. SUTER, Judge Advocate General of the United States Department of the Army,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

For purposes of clarity, Petitioners

shall be referred to as "Ikard" and Respondents shall be referred to as "Army".

The judgment of the United States Court of Appeals for the Eleventh Circuit, _____ F.2d _____ (1990), dated October 31, 1990, affirming the District Court judgment, is attached in the Appendix at page A-1.

The Opinion of the United States District Court for the Northern District of Alabama, _____ F.Supp. _____ (1990), dated January 12, 1990 and attached in the Appendix at page A-4, dismissed Ikard's cause of action on the grounds Ikard failed to exhaust its administrative remedies.

JURISDICTION STATEMENT

Jurisdiction of this Petition for Writ of Certiorari is conferred upon the United States Supreme Court by Section

1254(1) of Title 28 of the United States Code. Pursuant to Supreme Court Rule 17.1(c), review is sought of the dismissal decree entered by the United States District Court for the Northern District of Alabama and of the order affirming said dismissal by the United States Court of Appeals for the Eleventh Circuit.

STATUTORY PROVISIONS

5 U.S.C. 702 (See Appendix, page A-45)

5 U.S.C. 704 (See Appendix, page A-46)

5 U.S.C. 705 (See Appendix, page A-46)

5 U.S.C. 706 (See Appendix, page A-47)

15 U.S.C. 631 (See Appendix, page A-48)

15 U.S.C. 637(b)(7)(A) (See Appendix, page A-50)

28 U.S.C. 1254(1) (See Appendix, page A-51)

28 U.S.C. 2201 (See Appendix, page A-51)

28 U.S.C. 2202 (See Appendix, page A-52)

28 U.S.C. 1331 (See Appendix, page A-52)

28 U.S.C. 1361 (See Appendix, page A-53)

28 U.S.C. 1391 (See Appendix, page A-53)

FEDERAL ACQUISITION REGULATION PROVISIONS

9.101 (See Appendix, page A-54)

9.104-1 (See Appendix, page A-54)

9.104-3 (See Appendix, page A-55)

9.400 (See Appendix, page A-56)

9.402 (See Appendix, page A-56)

9.406-2 (See Appendix, page A-57)

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Ikard requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit directing said Court to (1) vacate its Order affirming the Order of the United States District Court for the Northern District of Alabama which dismissed Ikard's cause of action and (2) enter an order reversing and

remanding the aforementioned dismissal order and directing the District Court to grant the relief sought in Ikard's Complaint.

B. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURTS BELOW

The Complaint (Appendix page A-23) from which this appeal arises was filed December 29, 1989, seeking declaratory and injunctive relief under the Administrative Procedure Act, as amended, 5 U.S.C. 701 et seq.; the Armed Services Procurement Act of 1947, as amended, 10 U.S.C. 2301-2314; the Small Business Act, 15 U.S.C. 631 et seq.; the Federal Acquisition Regulations, Subpart 9.4 (concerning suspension and debarment), and both the Department of Defense and Army Supplements to said regulations; and the Declaratory Judgments Act, 28 U.S.C. 2201-2202.

Declaratory and injunctive relief was sought by Ikard to stop the Army from refusing to consider Ikard bids submitted in response to Army requests for quotations, invitations for bids, and solicitations on eighteen specific, individual, potential contracts.

The Army refused to consider Ikard's bids because suspension and pending debarment proceedings had been initiated by the Army against Ikard.

The Army's actions violated the Small Business Act, 15 U.S.C. 631 et seq.

The Complaint was properly served on the Army in accordance with Rule 4 of the Federal Rules of Civil Procedure.

Ikard filed a Motion for Preliminary Injunction and Hearing (Appendix page A-16) and accompanying memorandum of law on December 29, 1989. The Army filed Defendants' Motion to Dismiss (Appendix

page A-20) and accompanying memorandum of law on January 8, 1990. Ikard filed a reply memorandum on January 12, 1990.

On January 12, 1990, a hearing was held and United States District Court Judge Sam C. Pointer, Jr., entered an order (Appendix page A-4) denying Ikard's motion for preliminary injunction and granting the Army's motion to dismiss.

Notice of Appeal was filed with the United States Court of Appeals for the 11th Circuit on February 6, 1990. The 11th Circuit, on October 31, 1990, affirmed the United States District Court's Order, and issued as mandate its Judgment on November 26, 1990 (Appendix page A-1).

The case stands before this Court on the issue of whether the United States Court of Appeals for the 11th Circuit

erred in affirming the District Court's dismissal of Ikard's cause of action and denying Ikard's motion for preliminary injunction. The statute erroneously applied is the Small Business Act, 15 U.S.C. 631 et seq., and, in particular, Section 637(b)(7)(A).

C. FACTS

IMCO, Inc. (hereinafter "IMCO"), is an Alabama corporation located at Highway 231-431 North, Meridianville, Alabama. IMCO provides military hardware and sophisticated weapons systems' component parts to United States government agencies. IMCO is wholly owned by Jerry W. Ikard and is a fully qualified participant in the United States Small Business Administrations's (hereinafter "SBA") program for providing contract support and business development assistance to small businesses.

Ikard Manufacturing Company (hereinafter "IMC") was a sole proprietorship owned and operated by Jerry W. Ikard at the time of the suspension, is now owned by IMCO and is also located at Highway 231-431 North, Meridianville, Alabama. IMC provides military hardware and sophisticated weapons systems' component parts to the United States Government agencies. IMC was, at the time of the events complained of, a fully qualified participant in the SBA's program for providing contract support and business development assistance to small businesses.

Jerry W. Ikard (hereinafter "JWI") is the former owner of IMC, is the sole shareholder of IMCO and lives at 151 Becky Dr., Meridianville, Alabama.

Unless distinction of a particular

petitioner is necessary, all are hereinafter referred to as "Ikard".

Curtis R. Morton is the Commander of the United States Army Defense Contracts Administration Services Management Area-Birmingham (hereinafter "DCASMA"). DCASMA administers Ikard's government contracts. Defendant Morton was sued in his official capacity.

Maurice H. DeFord is the acting commander of the United States Army Legal Services Agency (hereinafter ("LSA"). LSA initiated suspension and debarment proceedings against Ikard. Defendant DeFord was sued in his official capacity.

William K. Suter is the Judge Advocate General of the United States Department of the Army (hereinafter "JAG"). JAG also initiated suspension and debarment proceedings against Ikard. Defendant

Suter was sued in his official capacity.

Michael P. W. Stone is the Secretary of The Department of the Army of The United States of America (hereinafter "DOD"). DCASMA, LSA, and JAG are component agencies or divisions of DOD. Defendant Morton was sued in his official capacity.

Unless distinction of a particular respondent is necessary, all are hereinafter referred to as the "Army".

On or about October 19, 1989, the Army mailed letters advising IMCO, IMC and JWI that they were "being considered for debarment by the Department of the Army pursuant to the authority granted by Federal Acquisition Regulation (FAR), Section 9.406". Each letter further advised them their business activities with the Army would be suspended pending resolution of the matter:

> Contractors proposed for debarment are excluded from receiving contracts, and agencies will not solicit offers from, award contracts to, renew or extend existing contracts with, or consent to subcontracts with these contractors, unless the acquiring agency's head or that person's designee determines in writing that there is a compelling reason to do so. Contractors proposed for debarment are also excluded from conducting business with the Government as agents or representatives of other contractors. (emphasis added).

The letter to IMC and JWI also stated:

> The proposed debarment of you and your firm, Ikard Manufacturing Company (IMC) are based upon the chronic failure of IMC to perform in accordance with contractual requirements.

No other grounds for debarment or suspension were alleged against IMC.

The letter to IMCO also stated:

> The proposed debarment of IMCO, Inc., is based upon its affiliation with Jerry Ikard and Ikard Manufacturing Company (IMC).

No other grounds for debarment or suspension were alleged against IMCO.

More than 95% of Ikard's revenues are

from contracts with United States government agencies. Ikard has numerous contracts pending with the Army.

IMCO submitted bids in response to specific Army invitations for bids, requests for quotations, and solicitations. The Army informed IMCO that its bids on eighteen specific, potential contracts would not be considered because of Ikard's pending suspension and debarment.

Even though the Army's suspension and proposed debarment of Ikard is based solely on the issue of Ikard's responsibility, the Army, as a matter of agency and departmental policy, did not refer to the SBA [as required by 15 U.S.C. 637(b)(7)(A)] its refusal to consider Ikard's bids on 18 separate, specific contracts.

Ikard has no adequate remedy at law

and no means for redress of wrongs complained of except through declaratory judgment and mandatory injunction proceedings to review the actions of the Army. Ikard exhausted all mandatory administrative remedies and has and will suffer immediate and irreparable harm unless the declaratory and injunctive relief prayed for is granted immediately.

ARGUMENT FOR ALLOWANCE OF THE WRIT

OVERVIEW

A plaintiff seeking preliminary injunctive relief must show (1) there is a substantial likelihood he will prevail on the merits, (2) the issuance of the injunction will not harm public interest, (3) the plaintiff will suffer irreparable harm if injunctive relief is not granted and (4) he has no adequate remedy at law. The trial court denied Ikard's motion for preliminary injunction and granted the Army's motion to dismiss.

The trial court held "plaintiffs have failed to exhaust their administrative remedies" (Appendix page A-14, footnote 2) and "the Army is not required to refer the matter to the SBA" (Appendix page A-14, footnote 2). The trial court more specifically stated:

> The court concludes that the primary issue in the case is one of law, on which the Army will prevail. . . . The action is dismissed on the grounds that plaintiffs have failed to exhaust their administrative remedies. Plaintiffs argue that the debarment procedure offered by the Army is improper, and that a party is not required to pursue relief through improper administrative channels. The argued impropriety is the Army's failure to refer the matter to the Small Business Administration (SBA). For reasons explained herein, this court concludes that the Army is not required to refer the matter to the SBA. This case, therefore, does not fall within the claimed exception to the requirement of exhaustion of administrative remedies. (Appendix page A-14, footnote 2)

The trial court erred in two respects. First, 15 U.S.C. 637(b)(7)(A) mandates that government procurement officers must, if denying a contract for any reason related to a small business contractor's responsibility, refer the matter for a final disposition to the Small Business Administration. Contrary to the trial court's holding,

suspensions and debarments are, according to Federal Acquisition Regulations, based on a contractor's responsibility. The Army's suspension and proposed debarment should have been referred to the SBA for final disposition.

Second, the Army refused to consider Ikard's bids on 18 different, specific contracts. The Army never referred any of the denials on these 18 specific contracts to the Small Business Administration for a final disposition. Both the letter and the spirit of the Small Business Act mandate referrals of specific contracts. The trial court erred by not requiring the Army to refer these 18 specific contract denials to the SBA.

The Small Business Act, 15 U.S.C. Section 637(b)(7)(A), requires the

referral of all issues of small business responsibility to the SBA. Section 637(b)(7)(A) states, in pertinent part:

> (b) It shall also be the duty of the Administration and it is empowered, whenever it determines such action is necessary--
>
> (7)(A) To certify to Government procurement officers . . ., **with respect to all elements of responsibility**, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, and tenacity, of any small business concern or group of such concerns to receive and perform a **specific** Government contract. A Government procurement officer . . . may not, for any reason specified in the preceding sentence, preclude any small business concern or group of such concerns from being awarded such contract without referring the matter for a final disposition to the Administration. [Emphasis added]

Finally, the explicit Congressional intent for the Small Business Act is to aid, counsel, assist, and protect, insofar as possible, the interests of small-business concerns. The Small Business Administration must act as a

buffer between small businesses and other Government agencies. The trial court's order undermines express Congressional intent for the Small Business Act. Ikard's position is harmonious with and promotes Congressional intent.

The questions are whether the Army must, pursuant to 15 U.S.C. 637(b)(7)(A), [1] refer its decision to suspend and propose debarment of Ikard to the SBA for review or [2] refer its refusal to consider Ikard bids on 18 specific contracts to the SBA for review. If either answer is yes, then Ikard must prevail in this petition.

The trial court used two arguments In ruling against Ikard (Appendix page A-8):

> First, Section 637(b)(7)(A) is by its terms limited to Government action on specific contracts, and is

inapplicable to suspensions and proposed debarments. Second, even if Section 637(b)(7)(A) were applicable to suspensions and debarments, it would not apply in this case.

ARGUMENT: PART I

RESPONSE TO TRIAL COURT'S ARGUMENT That Section 637(b)(7)(A) Is Inapplicable To Suspensions and Proposed Debarments

The trial court found Section 637(b)(7)(A) inapplicable to Ikard's suspension and proposed debarment by asserting it was limited to "specific" contracts. The trial court notes (Appendix page A-8):

> The section refers in its first sentence to a small business's responsibility to perform 'a **specific** Government contract,' and in its second sentence to the Government's denial of '**such** contract' to a small business.

The trial court missed half of Ikard's contention and complaint when it focussed on Section 637(b)(7)(A)'s "specific contract" language. While

Ikard contends the suspension and proposed debarment should have been referred to the SBA pursuant to Section 637(b)(7)(A), Ikard also contends the Army's refusal to consider Ikard bids on 18 separate, specific contracts should have been referred to the SBA. Assuming, arguendo, that the trial court's interpretation of Section 637(b)(7)(A) is correct, the trial court still erred because the Army, **in fact,** failed to comply with Section 637(b)(7)(A)'s mandates on 18 separate, specific contracts!

The trial court gave recognition to Ikard's contention that (Appendix page A-8):

> [T]he statute applies, **a fortiori**, to suspensions and debarments, which implicate many contracts. On this view, it would be absurd to grant a small business lesser protection against an action which carries a

greater danger of harm.

but discarded it by asserting Section 637(b)(7)(A) does not apply to suspension and debarment proceedings because (Appendix page A-9):

> the reasons for suspension and debarment often differ from the reasons for the denial of specific contracts.

While Ikard agrees the specific reasons for a particular suspension and proposed debarment may differ from the specific reasons for the denial of a particular contract, Ikard submits there was no evidence for the trial court to use to apply this exception to Ikard's case.

Further, all of the hearing evidence, statutes and federal regulations indicate the trial court erred in this conclusion. The primary function of both SBA Certificates of Competency and suspension and debarments are the same:

protection of the Government from nonresponsible contractors.

The Federal Acquisition Regulations (hereinafter "FAR") [not cited and totally ignored by the trial court] indicate the overriding public policy concern of suspensions and debarments is the protection of the Government from nonresponsible contractors.

FAR Subpart 9.4 sets forth the policies, procedures and purposes of suspension and debarment proceedings. In particular, FAR Section 9.402 states:

> 9.402 Policy.
>
> (a) Agencies shall solicit offers from, award contracts to, and consent to subcontracts **with responsible contractors only. Debarment and suspension** are discretionary actions that, taken in accordance with this subpart, **are appropriate means to effectuate this policy.**
>
> (b) The serious nature of **debarment and suspension** requires that these sanctions be **imposed only** in the public interest **for the Government's**

> **protection and not for purposes of punishment.** Agencies shall impose debarment or suspension to protect the Government's interest and only for the causes and in accordance with the procedures set forth in this subpart. (Emphasis Added)

Further, the FAR section relied on by the Army to suspend and debar Ikard unambiguously states that responsibility of the contractor is the primary concern. FAR 9.406-2 lists three causes of debarment. Part (a) [inapplicable to the case at bar] refers to convictions and civil judgments for fraud, criminal offenses, antitrust statutes, and the like.

Part (b) [relied on by the Army] refers to serious violations of government contracts. Part (c) is a catch-all clause that helps shed light on the purposes of Parts (a) and (b). FAR 9.406-2(c) states:

> The debarring official may debar a

contractor for any of the causes listed in paragraphs (a) through (c) following:

(c) Any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor. (emphasis added)

Based on FAR 9.402 and FAR 9.406-2, the primary focus of all suspensions and debarments is the responsibility of a Government contractor.

How is "responsibility" determined and what factors must a government contracting officer evaluate in determining a contractor's responsibility? The same factors the SBA examines to determine responsibility for issuance of a Certificate of Competency!

FAR 9.101 is a definitional section. It states a "'Responsible prospective contractor' means a contractor that meets the standards in 9.104."

FAR 9.104, in turn, states, at 9.104-1 (General Standards):

> To be determined responsible, a prospective contractor must--
>
> (a) Have adequate financial resources to perform the contract, or the ability to obtain them (see 9.104-3(b));
>
> (b) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;
>
> (c) Have a satisfactory performance record (see 9.104-3(c));
>
> (d) Have a satisfactory record of integrity and business ethics;
>
> (e) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them . . .;
>
> (f) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them (see 9.104-3(b)); and
>
> (g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations.

FAR 9.104 further states, at 9.104-3

(Application of Standards):

> (e) Small Business Concerns. If a small business concern's offer that would otherwise be accepted is to be rejected because of a determination of nonresponsibility, the contracting officer shall refer the matter to the Small Business Administration, which will decide whether or not to issue a Certificate of Competency (see Subpart 19.6). (Emphasis added).

These FAR sections undercut the trial court's premise that the SBA's "expertise is irrelevant to the Army's offered reasons for the suspension and proposed debarment of plaintiffs." The trial court is wrong. Rather than the SBA's expertise being irrelevant, the Small Business Act indicates the SBA's expertise regarding small business responsibility is critical!

The trial court also erroneously contended (Appendix page A-10):

> Plaintiffs' suspension and proposed debarment are not based on predictions of plaintiffs' present or future performance. Instead, the Army's

action is, and will be, based on its evaluation of plaintiffs' past performance.

Federal Acquisition Regulations indicate the purpose of suspension and debarments is the exact opposite of the trial court's conclusion.

Contrary to the trial court's finding, responsibility of the contractor is the only issue for FAR suspensions and debarments and, pursuant to FAR 9.104-1, ability to perform in the future is the ultimate focus of responsibility issues. While past performance is a primary factor in evaluating present and future responsibility, it is only one of many factors. The crux of the responsibility issue is whether a contractor will satisfactorily perform in the future.

How do FAR suspension and debarment factors to review compare to the factors the SBA evaluates before issuing a

Certificate of Competency? They are virtually identical. The following chart bears this out.

APPLICABLE FACTORS TO CONSIDER

FAR Suspension and Debarment:	**SBA Certificate of Competency:**
Contractor's Responsibility Is Main Focus?	
Yes	Yes
[FAR 9.104, 9.406-2(c)]	[637(b)(7)(A)]
Responsibility Factors to Consider:	
Capability?	
Yes	Yes
[FAR 9.104-1(a), (b), (e), (f)]	[637(b)(7)(A)]
Competency?	
Yes	Yes
[FAR 9.104-1 (e)]	[637(b)(7)(A)]
Capacity?	
Yes	Yes
[FAR 9.104-1 (f)]	[637(b)(7)(A)]
Credit?	

Yes	Yes
[FAR 9.104-1 (a)]	[637(b)(7)(A)]
Integrity?	
Yes	Yes
[FAR 9.104-1(d)]	[637(b)(7)(A)]
Perseverance and Tenacity?	
Yes	Yes
[FAR 9.104(c), 9.104-3(c)]	[637(b)(7)(A)]

The trial court's conclusion that "this aspect of the debarment renders Section 637(b)(7)(A) inapplicable to the process." (Appendix page A-10) is erroneous because its foundational premise (discussed above) is wrong.

Ikard submits the trial court's reasoning is flawed when it, in one breath, commends the SBA's expertise and purpose (Appendix page A-9):

> The Small Business Act was designed, at least in part, to preclude procurement officers from assuming that small businesses, simply because

> of their size, would be unable to perform specific contracts. The Small Business Administration (SBA) was intended to provide expertise on the capabilities of small businesses.

and then, in the next breath, concludes the SBA's expertise is "irrelevant to the Army's offered reasons for the suspensions and proposed debarment of plaintiffs" (Appendix page A-9, 10).

If the Army had relied on a clearly non-size related action by Ikard (such as a criminal offense or the like), the trial court's reasoning would stand. But the Army does not. The only basis for the suspension and proposed debarment is the issue of Ikard's responsibility as defined by the Federal Acquisition Regulations.

The trial court, just like the Army, is not in its realm of expertise when it concludes, without supporting evidence, that Ikard's past performance record was

not a direct or mitigating result of Ikard's size and status as a small business. As the trial court did indicate, the SBA has, by law and as a matter of fact, developed the expertise needed to determine whether Ikard's small business size was a causal factor of its past performance record and whether its size should have been taken into account when determining Ikard's present responsibility to perform future contracts.

Rather than being a reason for not giving Ikard the benefit of SBA advice and counsel regarding Ikard's responsibility, the SBA's small business expertise is a reason why the issue of Ikard's responsibility <u>should</u> have been referred to the SBA so both Ikard and the Army would benefit from the SBA's small business expertise.

Finally, and because of its reliance on a faulty premise, the trial court concluded (Appendix page A-10, 11):

> [P]laintiffs' argument would produce the implausible result that the Army could never suspend or debar a small business. Though the SBA is empowered to issue certificates of competency to small businesses for specific contracts, the SBA cannot issue blanket certificates of competency such as would be needed to satisfy the Army in this case. Plaintiffs thus would have the Army refer their debarment to an agency with no authority to decide the matter. There is no indication that this extreme result was intended to follow from the Small Business Act.

The trial court misconstrues Section 637(b)(7)(A), the FAR, and Ikard's position.

First, the purpose of the Small Business Act is to protect America's small businesses while they are in their embryonic stage from Government agencies that are overbearing, unsympathetic or out of touch with Congress's policy to

protect and promote small business growth. The trial court's position, not Ikard's, produces an implausible result in conflict with the intent of the Small Business Act.

Second, Ikard's stance does not take from the Army power to initiate suspension and debarment proceedings. It does, however, give small businesses protection from Army overbearance as provided by the Small Business Act. True, and as the trial court points out, the Small Business Act does not give the SBA the power to suspend and debar a contractor . . . but Ikard never contends it does. All Ikard demands is that a suspension and proposed debarment must be referred to the SBA <u>prior</u> to implementation for a final disposition by the SBA. This stance is in accord

with Section 637(b)(7)(A):

> A Government procurement officer . . . may not, for any reason specified in the preceding sentence, preclude any small business concern or group of such concerns from being awarded such contract without referring the matter for a final disposition to the Administration. (Emphasis added).

Section 637(b)(7)(A), although not giving the SBA the authority to suspend and debar, does give the SBA oversight authority on Government agency attempts to suspend and debar each time the affected small business contractor is denied specific contract rights. Suspensions and debarments of small businesses may continue provided they take place under the watchful eye of our Government's Congressionally appointed small business guardian . . . the SBA.

The trial court's view that suspensions and debarments need not be referred to the SBA while specific

contracts unrelated to suspensions and debarments are to be referred to the SBA yields incongruous results. The damage done to small businesses by a blanket rejection of a small business's bid on all contracts ("eligibility to solicit") is much greater than that done if a small business is found nonresponsible on just one contract. Rather than being a reason for denying the aid and protection of the Small Business Act to a small business, a blanket suspension and debarment on all contracts is an even more compelling reason for applying the Small Business Act referral requirements to the case at bar.

The trial court's argument is not unlike that of a murderer who claims innocence because he killed not one but eighteen people. The Army, with respect to Ikard, is killed not one contract, it

is killed Ikard's chance to compete on eighteen of them. Surely an exception that devours the rule does not reflect Congressional intent.

ARGUMENT: PART II

RESPONSE TO TRIAL COURT'S SECOND ARGUMENT: Even if Section 637(b)(7)(A) were applicable to suspensions and debarments, it would not apply in this case

The trial court contends, in its second argument, that "[t]he purpose of [Section 637(b)(7)(A)] is to protect small businesses from governmental discrimination on the basis of their size." (Appendix page A-11).

The trial court cites examples of the general rule that:

> When government action towards a small business clearly has nothing to do with the business's size, it would be fruitless to require the involvement of the SBA. See NFK Engineering, Inc. v. United States, 805 F.2d 372, 378 (Fed.Cir. 1986), Electro-Methods, Inc. v. United States, 728 F.2d 1471, 1476 (Fed.Cir., 1984); Siller Brothers,

Inc. v. United States, 655 F.2d 1039, 1044 (Ct.Cl. 1986), cert. denied 456 U.S. 925 (1982).

And concludes that:

> The suspension and proposed debarment of plaintiffs grew out of failure to perform in accordance with contractual requirements. There is no indication that the Army condones similar failures by large companies or that the Army's action is related to plaintiffs' size. Accordingly, plaintiffs' suspension and debarment are not among the actions that must be referred to the SBA. (Emphasis added).

The trial court's logic is faulty in many respects. First, it is contrary to both the intent and letter of the Small Business Act. Assuming, arguendo, that there was in fact "no indication . . . that the Army's action is related to plaintiff's size", that absence is neither relevant nor material.' Section 637(b)(7)(A) does not require referral to the SBA if the prospective contractor is a small business and if the

Government procurement officer's reason for denial directly relate to the size of the business.

Section 637(b)(7)(A) has but two requirements [(1) Small business status and (2) denial based on nonresponsibility]. Proof of a cause and effect between business size and the denial is not one of them. Ikard submits Congress recognized that neither trial courts nor the Army has the level of expertise to evaluate, like the SBA can, the relationship between Ikard's past small business performance record and Ikard's responsibility to be awarded future contracts.

Further, if trial courts must require evidentiary proof of cause and effect between business size and the reason for responsibility-based suspensions and

debarments, then the resulting litigation needed to resolve the evidentiary requirement would unduly burden the SBA, Government agencies, small business contractors and administrative law tribunals while rendering this portion of the Small Business Act impotent. Certainly such was not the intent of Congress.

Third, the holdings relied on by the trial court in NFK Engineering (supra), Electro-Methods (supra), and Siller Brothers (supra) are inapplicable to the case at bar. Ikard agrees these stand for the proposition that:

> When government action towards a small business clearly has nothing to do with the business's size, it would be fruitless to require the involvement of the SBA. (Emphasis added).

But the trial court erred in concluding that a small business's size, as a

matter of law, "clearly" has nothing to do with a small business's degree of responsibility for suspension and debarment purposes.

The cases cited reflect a much more limited view of what is "clear" and what is not. These cases, because of their dissimilar factual situations, do not justify the trial court's new rule of law.

None of the cases address the issue at bar. They relate to (1) criminal conduct by the small business or (2) single contract disqualifications regarding (a) a small business's right to bid on the reletting of a contract on which it had previously performed no work and defaulted or (b) improper conduct so severe as to undermine the integrity of the bidding process.

In NFK Engineering, NFK received inside information on a proposal from the Government's deputy director of the system being bid on. Prior to bid award, the deputy director was given an "exclusive consulting job" with NFK. Shortly after receiving this job and while still deputy director, the contract requirements changed to NFK's benefit and NFK became low bidder. NFK was disqualified because of its relationship with a government employee and the likelihood that it had won the contract because of insider information. The Court upheld the disqualification because NFK's conduct posed a threat to the integrity of the bidding process. NFK's disqualification had nothing to do with its status as a small business enterprise.

Electro-Methods was suspended on the basis of alleged criminal activity (728 F.2d at 1473):

> . . . the [Air Force Debarment and Suspension Review Board] determined that 'adequate evidence', akin to probable cause for a search warrant, existed of wrongdoing and recommended suspension of Electro, among others.

The Air Force's suspension of Electro had nothing to do with Electro's status as a small business enterprise.

Like NFK Engineering and Electro-Methods, Siller Brothers is also limited to its unusual facts.

Siller is not a suspension or debarment case. It is a single contract disqualification case. Siller had a contract to cut 3,390 thousand board feet of timber over a three year period. After three years, Siller had not cut one board foot. The contract was terminated for default. Siller was not

allowed to bid when the contract was readvertised. The Claims Court stated, at 1043:

> Although the language of the second sentence of the section [15 U.S.C. 637(b)(7)(A)] is broad enough to cover the Forest Supervisor's barring of the plaintiff from bidding on the second contract, the legislative history of the provision indicates that it was not intended to apply to this situation.

Further, at 1044:

> The purpose of this provision, as reflected in the legislative history of its predecessors, was to end the discrimination against small business that existed because contracting officers had barred those businesses solely because of their smallness and disabilities **allegedly** resulting from that fact. [Emphasis added]. There is no indication, however, that Congress also intended to cover the situation of the reletting of the contract after a small business firm had defaulted in performance.
>
> The Forest Service regulation does not discriminate against small businesses but generally bars all defaulting contractors from bidding upon the reletting of the contract. The Forest Supervisor refused to allow the plaintiff to participate in rebidding, not because of alleged

> deficiencies stemming from its size, but because of its failure to cut any timber under the prior contract. The result would have been the same if the plaintiff had not been a small business. In the special circumstances of this case -- where the plaintiff had not cut a single foot of timber under the contract for 3 years -- section 637(b)(7)(A) of the Small Business Act did not require the Forest Supervisor to refer the matter to the administrator before he could bar the plaintiff from participating in the rebidding of the contract. [Emphasis added.]

Siller does not stand for the broad proposition promoted by the trial court. To the contrary, the Claims Court went out of its way to state (655 F.2d at 1043):

> [T]he language of the second sentence of the section is broad enough to cover the Forest Supervisor's barring of the plaintiff from bidding on the second contract."

One could reasonably infer from the Claims Court opinion that the Small Business Act does require a referral to the SBA on responsibility-based matters

except when a contractor is attempting to rebid on its own defaulted contract.

The case closest to being on point is Horne Brothers, Inc. v. Laird, 342 F.Supp. 703 (D.C., 1972). Horne Brothers, a small business concern, was suspended by the United States Navy because its conduct indicates (342 F.Supp 705):

> [A] lack of business integrity and [brings] into serious question the present responsibility of your company as a Government contractor.

The suspension was (342 F.Supp 705):

> for a temporary period, pending the completion of the investigation and such legal proceedings which may ensue.

The district court granted Horne Brothers' request for a preliminary injunction staying the Navy's suspension. There were multiple statutory and regulatory violations by

the Navy, one of which was its failure to refer the matter to the SBA. With respect to the SBA, the district court stated, at 342 F.Supp. 707:

> The Navy's letter of December 14, 1971, contained a determination that Horne was not a responsible contractor since it did not have a satisfactory record of integrity, as that term is used in ASPR Section 1-903.1(iv) [ASPR is the predecessor of FAR].
>
> ASPR Section 1-903(iv) has a mandatory reference to ASPR Section 1-7054 [sic] (c)(vi) in the case of a small business concern.
>
> The Navy violated ASPR Section 1-705.4(c)(vi) by determining that Horne, a small business concern, was not responsible because of a lack of business integrity, as defined in ASPR Section 1-903.1(vi) without providing substantial evidence documented in the contract files to the appropriate SBA Regional Office, and to the appropriate departmental Small Business Advisor.

On appeal the United States Circuit Court of Appeals, D.C. Circuit, reversed the district court on other grounds. In so doing, it was careful to note, 463

F.2d 1269-1270:

> we make clear that we agree with the premise of the District Court that there are serious and fundamental questions regarding the fairness of procedures utilized by the Government in suspending contractors. We bring this out in order to avoid misunderstanding, and because it may affect further orders in the lawsuit.

ARGUMENT: PART III

Analysis of the Small Business Act's Congressional Intent and Its Application to Ikard's Position

The trial court's conclusions directly conflict with Congressional intent for the Small Business Act. The Act was designed to promote and protect America's fledgling small businesses. Ikard's position is in accord with the Congressional intent and public policy goals of the Small Business Act. The trial court's interpretation undermines them.

15 U.S.C. 631 states Congress's Declaration of Policy for the Small

Business Act:

> The preservation and expansion of such [free enterprise] competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as it is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services . . . be placed with small-business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the over-all economy of the Nation. [Emphasis Added]

Which position better promotes small business concerns, one which requires referrals to the SBA as a safeguard against Government agencies' disregard for the problems of small businesses or one which takes away the buffer and protection the SBA provides?

The Small Business Act's Legislative History (U.S. Code Congressional and Administrative News, 83rd Congress, First Session, 1953, Volume 2, page 2021) states:

> [The SBA] . . . would be given powers and duties to encourage and assist small-business enterprises in peacetime as well as in any future war or mobilization period. . . . The Small Business Administration would . . . certify to Government procurement officers as to the capacity and credit of small-business concerns to undertake a specific Government procurement contract . . .

While the original Small Business Act limited SBA certificates of competency to capacity and credit, a 1977 amendment strengthened the Act by expanding 15 U.S.C. 637(b)(7)(A) to include "all aspects of responsibility" by adding to "capacity and credit" a small business's "capability, competency, perseverance and tenacity" and by mandating that:

> A Government procurement officer or an officer engaged in the sale and disposal of Federal property may not, for any reason specified in the preceding sentence, preclude any small business concern or group of such concerns from being awarded such contract without referring the matter for a final disposition to the [SBA].

Congressional intent for the change is reflected in U.S. Code Congressional and Administrative News, 95th Congress, Legislative History, Volume 2, page 833:

> There is, at present, no statutory requirement mandating that once a COC is issued the contract must be let to the small business, nor does the statute include other elements aside from a small business's capacity or credit. This has resulted in severe problems for the small business community.
>
> Small business can and has been denied Government contracts because the procuring activity has determined that the small business lacked the requisite "tenacity, perseverance or integrity" to perform a specific Government contract. Such a finding results in the small firm being branded as "nonresponsible". Resort to the COC procedure in such cases is not available since capacity and credit are, purportedly, not involved. Although SBA normally has the right to

> appeal such determinations to a higher authority within the procuring activity, such action is of questionable value as there is an inherent difficulty in asking a bureaucracy to overrule itself. (Emphasis added).

and further, at 838:

> Title V of this bill would authorize the SBA to make all determinations regarding the responsibility of a small business concern to perform a specific Government contract. The term "responsibility" would include all criteria presently used by procurement officers. The title also provides that a contract may not be withheld for any such reason without referring the matter to the SBA for a determination. [Emphasis Added]

Which position, Ikard's or the trial court's, best reflects Congressional intent to protect and promote small businesses? If appeals by a Government agency as influential and powerful as the SBA "are of questionable value . . . in asking a bureaucracy to overrule itself", what chance does a small business have of successfully appealing

a decision of a part of the Army bureaucracy to another part of the same Army bureaucracy?

Can the trial court's view be consistent with the Congressional intent of the Small Business Act? Surely not.

The problem Congress expressly sought to cure with the 1977 amendment is the problem faced by Ikard. What chance does Ikard have of successfully appealing the suspension and proposed debarment determinations within the Department of Defense when it is Department of Defense agencies that advocate them? What chance is there of this bureaucracy overruling itself? Isn't a final determination of the responsibility issue by the SBA in accord with the express intent of Congress to provide resolution by a disinterested third party? Yes!

Granting Ikard relief inures to the public benefit by promoting the competition and growth of small businesses that is the Congressional purpose of the Small Business Act. Increased growth and competitiveness by small businesses will, in turn, provide government access to more sources for needed parts and supplies and, because of increased competition, will result in reduced prices the government has to pay for those parts and supplies.

CONCLUSION

Based on the foregoing, Ikard's Motion for a Preliminary Injunction was due to be granted and the Army Motion to Dismiss was due to be denied.

Wherefore, Ikard prays this Court will reverse the order and final decision appealed from and remand the action for further proceedings.

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